IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Writ Petition No.529 of 2006

Sayed Akbar Petitioner
Vs.
Smt. Hansa Jayantilal Gunderia & ors. Respondents

Mr.D.J.Lulia for petitioner.

Mr.A.S.Vraizee, Ms.Shataq Vraizee and Mr. Madnesh Singh for resp.nos.1 to 4.

CORAM: B.H.MARLAPALLE, J.

June 29, 2007.

P.C.

. Heard Mr.Lulia, the learned counsel for the petitioner. RAD Suit No.5305 of 1983 was filed by Mohmad Safi Sayed through his Constituted Attorney Mohamad Asraf Abdul Gani before the Small Causes Court at Mumbai for a declaration that the plaintiff was a protected tenant in respect of the suit premises viz. shed on the left hand side admeasruing 14’ 6" x 13’ 3" situated at 338/342/36, Ibrahim Rahimtulla Road, Mumbai 400 003. He filed Interim Notice NO.86 of 2004 stating that the plaintiff died on 13/9/2004 at Mumbai and that he was attending the business along with the deceased brother in the suit premises. He further stated that during the life time of the plaintiff, his wife had left him for the

last several years and her whereabouts were not known. He, therefore, claimed that he being the legal heir of his brother, be impleaded as the plaintiff in the suit which had already abated. The learned Judge of the trial Court allowed the said Interim Notice by his order dated 22nd June 2005 and directed that the applicant be allowed to continue in the suit as the plaintiff. The defendants-landlords challenged the said order by filing Revision Application No.152 of 2005 before the Division Bench of the Small Causes Court and the said revision has been allowed as per the judgment and order dated 8/11/2005 and hence this petition.

. The revision Court noted that Interim Notice No.86 of 2004 filed on 22/1/2004 was in fact under Order I Rule 10 of CPC as the applicant had prayed for being substituted as the plaintiff as the LR of his late brother - original plaintiff and under the Mohammedan Law the LRs would be the wife and the children, whereas a brother cannot come as the LR during the lifetime of wife and children. Though the petitioner has stated that the whereabouts of his late brother's wife were not known, in fact the wife appeared before the Court and stated that the present

petitioner could not come on record as the plaintiff because he could not be termed as the legal heir of his late brother. The revision Court further observed that if the petitioner had filed an application for being impleaded as a necessary party or an interested party as envisaged under Order XXII Rule 10 of CPC, his application could have been considered but the application filed under Order I Rule 10(2) of CPC could not have been entertained by the trial Court. The learned counsel for the petitioner relied upon the decision in the case of Amit Kumar Shaw & anr. Vs. Farida Khatoon & anr. **[2005 (5) ALL MR (S.C.) 458]** and more particularly the following observations in para 12 :

> "Under Order 22, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The

Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit."

. As noted earlier, Interim Notice No.86 of 2004 taken out by the petitioner was not under Order XXII, Rule 10 and it was under Order I Rule 10(2) of CPC. The view taken by the Revision Court below cannot be termed as perverse or manifestly erroneous so as to interfere under Article 227 of the Constitution. The petition is rejected summarily.

. However, having regards to the prayer made in Revision Application No.152 of 2005, the impugned order shall be restricted only to set aside the order passed in the Interim Notice No.86 of 2004 and nothing beyond. This order will not come in the way of the petitioner to take out fresh applications, as may be permitted in law.

(B.H.MARL